LEGISLATIVE AND REGULATORY UPDATE

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HIPAA's revised electronic transaction rules effective soon: Covered entities -- including group health plans -- generally will need to comply with HIPAA's latest electronic data interchange (EDI) rules by Jan. 1, 2012; small plans will have an extra year to comply with certain rules. The EDI rules require covered entities and their business associates to conduct certain electronic transactions using standard transaction formats and code sets, which are periodically updated. Though the EDI standards mainly affect insurers, third-party administrators and providers, health plan vendors may expect employers to send data using the new formats and code sets. **Full text of revised EDI rule on code sets (HHS, 16 Jan 2009); Full text of revised EDI rule on health care and pharmacy transactions (HHS, 16 Jan 2009)**

Regulators flag retirement rules for reconsideration and possible streamlining: Retirement plan regulators have identified a wide array of rules to re-examine in the wake of President Obama's call for a wholesale review aimed at cutting the costs and administrative burdens of federal regulations. The PBGC will reconsider proposed regulations on facility closings and reportable events, among other rules. The Labor Department may streamline the process for obtaining prohibited transaction exemptions but has not made a commitment to ease plan sponsors' disclosure burdens. The IRS will focus primarily on barriers to lifetime-income options in qualified plans. Full text of PBGC's preliminary plan (White House, 25 May 2011); Full text of DOL's preliminary plan (White House, 25 May 2011); Full text of Treasury Department's preliminary plan (White House, 18 May 2011)

Final PBGC rules set benefit guarantees for pension plans terminating in bankruptcy: Final PBGC regulations describe benefit guarantees for pension plans that terminate while the plan sponsor is in bankruptcy. Under the final rules, a plan sponsor's bankruptcy filing date displaces a plan's termination date as the controlling date for certain purposes, which generally reduces the levels of PBGC-guaranteed benefits and benefits receiving priority treatment under ERISA's hierarchy for allocating plan assets. The rules make minor refinements to the PBGC's 2008 proposal and apply retroactively to bankruptcy filings on or after Sept. 16, 2006.

IASB amends standard on employers' accounting for retirement plans: A recently issued IASB amended standard revises employers' accounting for pension, retiree medical and other post-employment benefits. Amended IAS 19, Employee Benefits, requires balance sheet recognition of a defined benefit plan's net funded status, prescribes how to present changes in a plan's funded status in the employer's comprehensive income statement, and expands disclosures about plan characteristics and risks. The amended standard is effective for fiscal years beginning on or after Jan. 1, 2013, and may be applied earlier. Press release on amended IAS 19, with links to standard and related resources (IASB, 16 Jun 2011)

Rx creditable coverage notices updated: The Centers for Medicare and Medicaid Services (CMS) has revised its model creditable and noncreditable coverage notices for group health plans offering prescription drug benefits to Medicare-eligible employees and retirees. Because the Medicare annual enrollment period now starts Oct. 15, plans must distribute notices one month earlier this year than in previous years. Full text of model creditable coverage disclosure notice - English (CMS, 17 May 2011); Full text of model creditable coverage disclosure notice - Spanish (CMS, 17 May 2011); Full text of model noncreditable coverage disclosure notice - English (CMS, 17 May 2011); Full text of model creditable coverage disclosure notice - Spanish (CMS, 17 May 2011)

Replaced workers are not part of a WARN Act reduction in force, court says: Job losses triggering WARN Act notices exclude staff replaced by employees returning from a strike, the 8th Circuit recently ruled *(Sanders vs. Kohler Co.)*. During a strike, an employer hired 123 "permanent replacement workers," saying the strike's outcome would not affect their status. Yet once the strike ended, the employer rehired 103 strikers and fired the replacement workers. They sued for WARN Act violations, arguing their job losses met the law's 50-employee threshold. However, the 8th Circuit found only the 20 positions not filled by rehired strikers count as "job losses," so the WARN Act did not apply.

Last call for waivers of annual dollar limits -- all requests due by Sept. 22: Group health plans have until Sept. 22 to request waivers from health care reform's minimum annual dollar limits for 2012 and 2013. New HHS guidance explains how plans can extend existing waivers or obtain first-time waivers lasting until 2014, when no annual dollar limits can apply to essential benefits. Along with posting tailored application forms for new or extended waivers, HHS has revised the model notice that plans granted waivers must display in materials for covered individuals. HHS will accept applications from June 24 through Sept. 22. Full text of supplemental guidance on annual limit waivers (CCIIO, 17 Jun 2011); CCIIO website with waiver application forms and instructions (17 Jun 2011)

Health care reform's internal claim processes and external review rules revised again: Nongrandfathered group health plans and insurers will need to comply with revised rules on internal claim processes and external reviews. The revisions ease the deadline to decide urgent claims in certain situations, don't require diagnostic and treatment codes in claim denial notices, clarify when to provide foreign-language notices, and modify external review rules. New technical guidance provides updated model notices, instructions on the federal external review process and tools for the foreign-language notices. The rules generally take effect July 22, but certain grace periods apply.

Proposed 162(m) regs clarify option exemption, IPO transition relief: Newly proposed regulations under Code Section 162(m) would clarify how stock options and stock appreciation rights (SARs) can qualify as performance-based pay exempt from the $1 million annual cap on deductible compensation paid to "covered employees." Despite private letter rulings suggesting

the opposite, the proposal also would clarify that restricted stock units and phantom stock are not eligible for the more generous transition relief that is available for options, SARs and restricted stock when a company goes public. Comments on the proposed regulations are due Sept. 22. Full text of proposed 162(m) regulations (Federal Register, 24 Jun 2011)

First appellate court upholds health care reform's individual mandate: The first appellate court to review the health care reform law has ruled the individual mandate constitutional *(Thomas More Law Ctr. vs. Obama (June 29, 2011))* . The 6th Circuit decision says the mandate is one way to regulate individuals' practice of "self-insuring" their health care. That practice ultimately affects national commerce since individuals unable to pay for their health care drive up premiums and price even more people out of the health insurance market. As a result, imposing the individual mandate falls within Congress' constitutional authority to regulate commerce. Other appellate decisions on the law are still pending.

State health insurance exchange, insurance market stability program proposals issued: New guidance proposes standards for state-run health insurance exchanges and methods to stabilize the health insurance market through reinsurance, risk corridor and risk adjustment. Released July 11 by the Department of Health and Human Services (HHS), the proposals address two key health care reforms slated to begin in 2014. HHS will accept comments for 75 days after the proposed regulations appear in the Federal Register on July 15. HHS news release, fact sheets, and related resources (HealthCare.gov, 11 Jul 2011)

SEC addresses reporting say-on-pay frequency vote results, pay disclosures: Updated SEC guidance addresses how to report say-on-pay frequency vote results and handle proxy disclosure of certain types of executive pay. The frequency vote guidance permits companies to disclose vote results using either Forms 8-K or periodic reports, such as Forms 10-Q or 10-K. The executive pay disclosure guidance clarifies the proxy treatment of nondiscriminatory disability plans, certain performance share plans and non-GAAP financial information. Full text of CD&I 121A.03 on disclosing say-on-pay frequency vote results (SEC, 8 Jul 2011); Full text of CD&I 121A.04 on reporting frequency vote results (SEC, 8 Jul 2011); Full text of CD&I 119.28 on disclosing one type of performance share plan (SEC, 8 Jul 2011); Full text of CD&I 118.08 on disclosing non-GAAP financial measures (SEC, 8 Jul 2011); Full text of CD&I 117.07 on disclosing disability plans (SEC, 8 Jul 2011

Labor Department extends retirement plan fee disclosure deadlines: Covered service providers to defined benefit and defined contribution plans -- such as investment advisers, recordkeepers and consultants -- must disclose fees to plan fiduciaries by April 1, 2012, under final Department of Labor (DOL) regulations *(76 Federal Register 42539, July 19)*. The new deadline is three months later than brief

extension initially proposed. Calendar-year 401(k)-type plans must send initial participant fee disclosures by May 31, 2012, and deliver the first quarterly statement of actual charges by Aug. 14, 2012. DOL intends to offer more guidance on electronic delivery before participant disclosures are due.

EEOC steps up scrutiny of medical leave policies under the ADA: Leave issues under the Americans with Disabilities Act (ADA) are drawing increased attention from the Equal Employment Opportunity Commission (EEOC). Earlier this month, EEOC announced a $20 million settlement of charges that a "no fault" attendance policy failed to accommodate employees with disabilities. That case -- "the largest disability discrimination settlement in a single lawsuit," EEOC says -- is the latest example of ADA litigation involving leave policies. At a June meeting on leave as a reasonable accommodation, an EEOC attorney offered employers five lessons from these cases. Press release on settlement of ADA lawsuit (EEOC, 6 Jul 2011); EEOC website with meeting materials on ADA and leave (EEOC, 8 Jun 2011)

Draft rules detail health exchange coverage, premium credits, Medicare/CHIP issues: Three new sets of draft rules for health insurance exchanges address premium credits for coverage, eligibility determinations for individuals and small groups, employer requirements for small-group coverage, and coordinated changes to Medicaid and CHIP eligibility and enrollment processes. Issued by the US Department of Health and Human Services and the Treasury Department, the proposed regulations reflect the health care reform law's requirement for streamlined processes to determine eligibility and enroll in exchange plans. Regulators will take comments through Oct. 31. Press release on proposed rules (Treasury/HHS, 12 Aug 2011); Fact sheet on proposed rules (HealthCare.gov, 12 Aug 2011); Fact sheet on premium tax credits (Treasury, 12 Aug 2011); Fact sheet on eligibility and employer standards (HealthCare.gov, 12 Aug 2011); Fact sheet on coordination with Medicaid/CHIP (HealthCare.gov, 12 Aug 2011)

Timely PPA notices meet duty to tell participants about pension cutbacks, court rules: Providing timely notices within Pension Protection Act (PPA) deadlines fully satisfies a plan administrator's fiduciary duty to inform participants about funding-based benefit restrictions or cutbacks, a district court has ruled *(McGuigan v. Local 295/Local 851 IBT Employer Group Pension Plan, August 4, 2011)*. While the decision concerns a multiemployer plan and is not binding on other courts, it is among the first to consider whether a fiduciary has any duty to notify participants ahead of PPA deadlines when imposing mandatory benefit restrictions. The court's rationale may give comfort to both single-employer and multiemployer plan sponsors implementing such restrictions.

HHS announces 2012 Part D premium amounts: Part D premiums and related amounts for 2012 should remain largely unchanged from 2011 levels, the Department of Health and Human Services (HHS) has announced. Using bids received from Medicare prescription drug plans, HHS estimates the national average premium for a Part D plan will be about $30 per month in

2012 -- the same as in 2011. HHS has set the 2012 "base beneficiary" Part D premium at $31.08 per month. This figure is used as a starting point for Part D plans when they determine their actual premium rates. Actual 2012 Part D premiums should be available in September. Press release announcing 2012 Part D premiums (HHS, 4 Aug 2011; Full text of notice explaining calculation of 2012 Part D amounts (CMS, 3 Aug 2011)

Regulators release long-awaited guidance on health plan benefit and coverage summaries: As insurers and group health plans prepare to provide the uniform summary of benefits and coverage (SBC) required by the health care reform law, new guidance and templates detail mandatory content, recipients, delivery timing, and other specifications. The guidance also requires plans to give covered individuals at least 60 days' advance notice of any midyear material modifications affecting SBC content. Regulators are seeking comments by Oct. 21, including input on special issues for group health plans and the feasibility of the March 23, 2012, deadline to begin providing SBCs. Fact sheet on uniform summary of benefits and coverage (HealthCare.gov, 17 Aug 2011)

Reporting separated participants with deferred vested retirement benefits: Retirement plan administrators must follow new procedures to report separated participants with deferred vested benefits, starting with the 2009 plan year. The new IRS Form 8955-SSA, which can be used for 2009 and 2010 plan year filings, has several changes from its predecessor (Form 5500's Schedule SSA), including an e-filing option. For administrators of ERISA-covered 403(b) plans, this reporting obligation is entirely new. This article presents an overview of filing requirements, including special rules for 2009 and 2010 plan years. For most plans, the first filing is due by Jan. 17, 2012. Full text of Form 8955-SSA (IRS, 18 Jun 2011); Full text of Form 8955-SSA instructions (IRS, 18 Jun 2011); Full text of Form 5558 (IRS, 8 Jul 2011); IRS website with Form 8955-SSA resources

Early retirement plan with age-55 window violates ADEA, appeals court says: A bargained pension plan requiring employees to retire on their 55th birthday to receive retiree health incentives was "facially discriminatory" under the Age Discrimination in Employment Act (ADEA), the 8th Circuit has ruled *(EEOC v. Minnesota Dep't of Corrections, August 10, 2011)* in a case brought by the Equal Employment Opportunity Commission (EEOC). By using age as the sole basis for denying eligibility, the plan failed to satisfy a safe harbor for voluntary retirement incentive plans consistent with the ADEA's purposes. The ruling underscores the risk of an EEOC challenge when plan benefits decrease or terminate with age.

Many health reimbursement arrangements exempt from dollar limit rules -- for now: Employers with stand-alone health reimbursement arrangements (HRAs) that aren't integrated with other health coverage or limited to retirees now have a blanket exemption from health care reform's restrictions on annual dollar limits until 2014. New guidance from the Department of

Health and Human Services eliminates the need to seek annual-limit waivers for such HRAs if they were set up before Sept. 23, 2010. Integrated and retiree-only HRAs are already exempt. Despite this temporary relief, employers with HRAs otherwise subject to the annual-limit rules still have notice and reporting duties. Full text of HHS guidance on temporary HRA exemption from restrictions on annual dollar limits (19 Aug 2011)

Range of funds protected 401(k) fiduciaries from fee claims in 3rd Circuit ruling: The 3rd Circuit has rejected excessive fee claims against 401(k) plan fiduciaries in light of the plan's "reasonable mix and range of investment options *(Renfro v. Unisys, August 19, 2011)*." Like two other appeals courts, the 3rd Circuit analyzed these claims by considering the plan's investment lineup as a whole -- the number of funds, as well as the variety of risk profiles, investment strategies and fees. Here, the plan offered a mix of 73 options, including some lower-cost funds. The appeals court declined to rule on whether ERISA Section 404(c) acts as a shield if a fiduciary imprudently selects investments.

Employers must post notice of employees' labor-law rights under final NLRB rule: An NLRB final rule requires covered employers to post notices of employees' rights under the National Labor Relations Act, such as the right to join unions, bargain collectively and take other "concerted actions." The rule prescribes the size, form and content of the notice, including specific language that employers must use, posting NLRB translations for employees not fluent in English. Failure to post is considered an unfair labor practice. Slated for publication in the Aug. 30 Federal Register and effective 75 days later, the final rule largely tracks the NLRB's proposal and a similar Labor Department notice requirement for federal contractors. Full text of final rule on employee notices of NLRA rights (NLRB, 25 Aug 2011)

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